S.Ct. 1758, 12 L.Ed.2d 977 (1964). This contention is without merit since there is no evidence that he ever requested counsel. See Green v. State, supra, and Mefford and Blackburn v. State, 235 Md. 497, 201 A.2d 824 (1964).

"Careful inspection of the record concerning the circumstances surrounding the giving of the confession reveals no evidence that it was not freely and voluntarily made. There is no evidence that the appellant ever asked to contact his family or requested food. He was not questioned by relays of officers. According to the police testimony and the [fol. 124] written confession itself, the appellant was advised that his statement must be voluntary, that there would be no threats or promises, and that it could be used in a court of law against him. There was no contradictory evidence. The trial court's finding that the confession was voluntary was supported by the evidence." 205 A.2d at 285

We also note the interpretation of the federal court of the effect of the Escobedo case, as set forth in Jackson v. United States, 337 F.2d 136 (1964).

"Defense counsel moved to suppress 'any and all confessions and admissions written or oral obtained by the United States since the date of his arrest and presentation to a committing magistrate.' As grounds for the motion, appellant claimed that the confessions and admissions were elicited from him 'involuntarily' in violation of the Fifth Amendment and of the appellant's right to counsel under the Sixth Amendment. [337 F.2d at 138]

* * * *

"Obviously neither *Escobedo* nor *Massiah* can be read as barring use of this appellant's confession. Many, learned in the law, deeply believe that no accused should be convicted out of his own mouth. But the Supreme Court has never announced any such proposition—not even where the accused had no attorney and had received no Rule 5 'judicial caution.' United

States v. Mitchell, 322 U.S. 65, 70, 64 S.Ct. 896, 88 L.Ed. 1140 (1944). We said as much ourselves only a month ago in Ramey v. United States, 118 U.S. App. D.C. ——, 336 F.2d 743 (1964), cert. denied, 85 S.Ct. 79 (1964) and see United States v. Carignan, 342 U.S. 36, 72 S.Ct. 97, 96 L.Ed. 48 (1951) where Rule 5 advice had been imparted. If there were a rule that a confession may not be received *if made by an accused without counsel*, that would be the end of this case—and of scores like it.

"We conclude that no rule of law required the exclusion of this appellant's confession, voluntarily made, after he had been warned by the F.B.I., the police and the United States Commissioner acting pursuant to Rule 40 (b). He had not requested that counsel be appointed; he had retained no lawyer; that one was not then appointed for him denied him no right; and as the law now stands, there is no automatic rule of exclusion which will bar use of such a confession by an accused who has no lawyer, under circumstances such as appear on the record before us." 337 F.2d at 140

[fol. 125] Other cases, in interpreting the effect of Massiah and Escobedo, have held that the test of admissibility of a statement was not whether defendant had counsel but whether the statement was in effect voluntary, some even holding that it was not necessary that he be warned that it might be used against him. People v. Hartgraves, 31 Ill.2d 375, 202 N.E.2d 33; People v. Agar, 44 Misc.2d 396, 253 N.Y.Supp.2d 761; Commonwealth (Pa.) v. Patrick, 206 A.2d 395; United States v. Konigsberg, supra; Fox v. State, 131 N.W.2d 684 (Iowa); Worley v. State, 132 N.W. 2d 764 (Nebr.).

What is the purpose of the right to counsel? What is the purpose of the Sixth and Fourteenth Amendments? Without question it is to protect individual rights which we cherish, but there must be a balance between the competing interests of society and the rights of the individual. Society has the right of protection against those who roam the streets for the purpose of violating the law, but that

protection must not be at the expense of the rights of the individual guaranteed under the Sixth and Fourteenth Amendments to our Constitution.

In Bean v. State (Nev.), 398 P.2d 251 (1965), the court, after discussing the Escobedo case, stated:

> "Here it is true that the investigation had begun to focus upon Bean; that he had been taken into police custody; that the police were about to commence a process of interrogation to elicit incriminating state-
> [fol. 126] ments, and did so; that Bean was not warned of his absolute constitutional right to remain silent. However, Bean did not request counsel, nor was he denied the assistance of counsel. Absent such a request, and denial of counsel, the rule of Escobedo does not apply.
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> * * * *
>
> "In Morford v. State, 80 Nev. ——, 395 P.2d 861, we discussed the Dorado case, pointing out that it is an extension of the rule announced in Escobedo, and chose not to follow it." 398 P.2d at 254.

We are familiar with the case of State of California v. Dorado, 40 Cal. 264, 394 P.2d 952, and, like the Supreme Court of Nevada, do not choose to follow Dorado in the extension of the rule announced in Escobedo, supra.

It will be noted in the discussion of these cases—particularly the Escobedo case—the ruling of the court is based upon the circumstances of the particular case. The court, in making its holding in the Escobedo case, stated "under the circumstances here the accused must be permitted to consult with his lawyer." Most of the cases distinguish the Escobedo case on the grounds that the defendant requested and was denied the right to counsel during interrogation. The Escobedo case merely points out factors under which—if all exist—it would not be admissible. We hold that a confession may be admissible when made without an attorney if it is voluntary and does not violate the constitutional rights of defendant.

Each case must largely turn upon its own facts, and the court must examine all the circumstances surrounding the taking of the statement in determining whether it is

voluntary, and whether defendant's constitutional rights have been violated.

[fol. 127] The facts and circumstances in the instant case show that the statement was voluntary, made by defendant of his own free will, that no threats or use of force or coercion or promise of immunity were made; and that he understood his legal rights and the statement might be used against him. Under such facts and circumstances we hold that, notwithstanding the fact that he did not have an attorney at the time he made the statement, and the investigation was beginning to focus upon him, defendant's constitutional rights were not violated, and it was proper to admit the statement in evidence.

Judgment affirmed.

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ERNEST W. MACFARLAND, Justice

CONCURRING:

.....

LORNA E. LOCKWOOD, Chief Justice

.....

FRED C. STRUCKMEYER, JR.
Vice Chief Justice

.....

CHARLES C. BERNSTEIN, Justice

.....

JESSE A. UDALL, Justice

[fols. 128-129]

[Triple Certificate (Omitted in Printing)]

[fol. 130]

SUPREME COURT OF THE UNITED STATES

No. 419 Misc., October Term, 1965

ERNESTO A. MIRANDA, PETITIONER

v.

ARIZONA

On petition for writ of Certiorari to the Supreme Court of the State of Arizona.

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND GRANTING PETITION FOR WRIT OF CERTIORARI—November 22, 1965

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 759 and placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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